

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, March 17, 2015
8:50 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

THE COURT: First, I just want to get a sense of timelines, where we are. We're moving along quickly.

MR. WEINREB: So today is going to be a lot of forensic evidence. And I'm a little unclear how long that will take. I think we're planning on getting through -- we think we'll probably get through most of it today and then there will be some more of it tomorrow, and then we move into some of the post-bombing searches, like the defendant's apartment.

THE COURT: The warrants?

MR. WEINREB: Yeah.

MR. CHAKRAVARTY: So the unknown is we have Mr. Silva testifying today. Tomorrow we may have Mr. Tazhayakov testify, who is another cooperator, and then on Thursday our plan is to call the computer forensic expert.

THE COURT: When? I'm sorry?

MR. CHAKRAVARTY: Thursday.

THE COURT: Thursday?

MR. WEINREB: So we'll clearly be going into the following week. And I think -- it's quite possible we will finish up the following week, and then we'll be done.

THE COURT: With computer stuff?

MR. WEINREB: Computer stuff and the ME is --

MR. CHAKRAVARTY: Yeah, the ME is going to testify. And then to talk about some of the stuff on the computers will

1 probably be early next week.

2 MR. WEINREB: There will be some expert testimony.
3 And we might not make it all the way to the end. Again, this
4 is an area where there may be more cross-examination than we've
5 seen before, so it could be longer.

6 MS. CLARKE: I don't think we've gotten notice of the
7 three forensic people for today.

8 MR. WEINREB: Well, the fingerprint expert, Patrick
9 Moynihan; the DNA expert, Jennifer Montgomery; and --

10 MS. CLARKE: And then Tanguay. It looks like --

11 MR. CHAKRAVARTY: Yeah, Kelly King and Tanguay,
12 they're not experts.

13 The third expert is Chris Donahue who's not going to
14 testify until tomorrow. We don't think we'll reach him until
15 tomorrow.

16 MS. CLARKE: He's not on our list, right?

17 MR. WEINREB: He's on a list because someone asked me
18 if he was going to testify today, and I said tomorrow.

19 MS. CLARKE: I don't think we have a list with him on
20 it.

21 THE COURT: What's his field?

22 MR. WEINREB: He's also a fingerprint examiner.

23 THE COURT: Okay. And what do you expect when the
24 government is finished?

25 MS. CLARKE: Well, we're trying to figure that out.

1 We have a few witnesses we're trying to list now to provide to
2 the government. We have provided them a list of exhibits for
3 the guilt phase. I don't expect we would go more than two or
4 three days.

5 THE COURT: Okay. So I'm just trying to do the
6 calendar in my head. That would be the first week of April?

7 MS. CLARKE: If you're done the middle of next week.

8 MR. WEINREB: Yeah. Or towards --

9 THE COURT: I think March the 30th and 31st are the
10 Monday and Tuesday of the next week.

11 MS. CLARKE: Some of it depends, Judge, on how much we
12 can do through cross, whether we have to call government
13 witnesses back. We haven't been able to calculate that yet
14 because we haven't finished -- and I didn't know until this
15 minute that there was another cooperator testifying tomorrow.
16 You know, so some information can come out that way. So that
17 really can affect us.

18 We have some experts to put on in guilt.

19 THE COURT: What subjects?

20 MR. FICK: Computer forensics and then Islamic --

21 MR. BRUCK: And then responsive experts to the
22 terrorism expert.

23 THE COURT: Is there a terrorism expert in the guilt
24 phase?

25 MR. CHAKRAVARTY: There is.

1 MS. CLARKE: We just don't know who.

2 THE COURT: Who?

3 MR. CHAKRAVARTY: It will likely be Matt Levitt on
4 Monday.

5 THE COURT: Is he included in the motion as a -- sort
6 of a multi-witness motion about terrorism experts from the
7 defense?

8 MR. BRUCK: Yes.

9 THE COURT: He's one of the people --

10 MR. BRUCK: Well, we haven't known until this moment
11 which expert would be --

12 THE COURT: There are several people attacked, if I
13 can use that word, in the motion.

14 MR. BRUCK: Yes. Well, all of the reports had a
15 similar problem, which was the following out the biographies of
16 every author all the way through the history of the 21st
17 century.

18 THE COURT: Okay. Well, I want to begin to prepare
19 for the instruction phase, so I think in the government's trial
20 brief there is an outline of what the government thinks the
21 elements of the offense are. I would be interested in any view
22 that the defense has about that substantively. If you disagree
23 with the substance of the offense, we can deal with other kinds
24 of instruction issues, but I would like to get nailed down what
25 the substantive law is for the offenses, and if there's any

1 disagreement, resolve it.

2 MR. WEINREB: Your Honor, I don't know that we briefed
3 it in detail in the trial brief, but I think that the --
4 ironically, the more unusual offenses being charged in this
5 case, like bombing a place of public use and so on, the
6 elements will be rather straightforward. It's the 924(c) and
7 924(j) counts that get complicated.

8 THE COURT: Right.

9 MR. WEINREB: And I think all potential problems with
10 those can be resolved simply by having the jury make individual
11 findings with respect to the different components of those
12 offenses that are arguably elements that are -- rather than,
13 you know, the sentencing factors and things that raise the
14 maximum penalty, they need to make some findings specifically
15 about those. And in addition, there is this case law that says
16 that user -- "using in furtherance of" and "carrying" are two
17 separate offenses. And so if a jury only makes a single
18 decision where those are phrased in the alternative, that
19 that's actually either duplicitous or multiplicitous. But
20 either way, if they make the finding separately, then it won't
21 be.

22 We'll prepare a proposed verdict form that will break
23 it out the way we think it needs to be broken out.

24 THE COURT: Okay.

25 MR. WEINREB: I don't know if the defense wants to --

1 MS. CLARKE: It would be nice if we could.

2 THE COURT: Yeah, that would be helpful. I mean,
3 obviously it would be better if there was agreement on it.

4 MR. WEINREB: Yes, of course. I don't think there
5 should be disagreement.

6 THE COURT: One question I had, which I have only
7 framed as a question, I haven't done any looking at it, is some
8 of them charge carrying during and in relation to use of a
9 weapon of mass destruction when both the weapon of mass
10 destruction and the firearm are the same thing. And I was
11 wondering whether that's duplicitous.

12 MR. WEINREB: All --

13 THE COURT: I just raise the question.

14 MR. WEINREB: Okay. I'll -- we'll --

15 THE COURT: I mean, normally -- you know, the one we
16 see most commonly is the drug dealer carrying a gun. The drugs
17 and the gun are different.

18 MR. WEINREB: Right.

19 THE COURT: Here the carrying of the bomb to use the
20 bomb.

21 MR. WEINREB: Right. So I know we researched that
22 question and I'm confident they're not but if the Court --

23 THE COURT: It won't surprise me if they're not
24 because the law sometimes thinks that way, but I raise it.

25 MR. WEINREB: Right. I mean, we can -- again, we're

1 certainly willing to discuss -- this is something we briefed
2 way back when we indicted the case, so --

3 THE COURT: No, that raises a related question,
4 whether it's necessary to send all 30 counts to the jury.

5 MS. CLARKE: We had that thought.

6 THE COURT: I'm sure you did. You're somewhere around
7 zero, probably?

8 (Laughter.)

9 MS. CLARKE: No, but we had that thought quite some
10 time ago on a motion to dismiss.

11 MR. WEINREB: And I think our answer is that the state
12 of the law is, in fact, unsettled on many of these questions
13 and that given that, although it's more work for the jury, the
14 safest approach is to have them make findings on everything so
15 that if afterwards certain ones have to be struck or
16 eliminated, we don't have to go back and retry the whole case;
17 we can just take care of everything afterwards.

18 So I think a carefully crafted verdict form and
19 instructions will solve all problems.

20 THE COURT: Okay. Well, I just want to encourage that
21 process to get going so that we can be ready when the time
22 comes, if it comes faster than we think, so...

23 MR. WATKINS: May I just go back to scheduling a
24 little bit because we're trying to -- the Court originally set
25 kind of a two weeks in advance, two weeks witnesses' notice.

1 We've not adhered to that really at all. I know that this has
2 raced by faster than even the government -- but it's creating
3 quite a bit of problems, as we talked about yesterday.

4 For example, today I just heard that we're kind of
5 racing towards the end, we talked about forensics being done
6 today. But, of course, there are many expert witnesses from
7 the FBI that the government has noticed about the
8 bomb-building, for example. We have not touched on that at all
9 in this recitation. I didn't hear anything about that. If the
10 government is going to drop that, fine, I'm going to move on to
11 something else, but if it's going to come up as a surprise that
12 we're now sticking that in, then personally, I don't see how
13 they could be done by the end of next week and put in what is
14 some pretty complicated testimony, explaining to the jury about
15 what some of these factors are about. So I'm just trying to
16 get some clarity about where these kinds of things are going.
17 So that's one thing.

18 Ms. Clarke talked about the two or three or three or
19 four days. The government is being quite stingy, for want of a
20 better word, about what they're going to let us put in on their
21 case. An example was yesterday, there's this issue about
22 Officer Donahue being injured by friendly fire as opposed to a
23 stray bullet. I'm not clear at all whether the government is
24 conceding that. If, indeed, they're conceding that it's
25 friendly fire, we should say that outright to the jury. I have

1 not heard that.

2 If they're not going to do that, we need to put on
3 witnesses, government witnesses that were on their list at one
4 time but were taken off. These were people who were supposed
5 to testify yesterday, including Officer McCormack, who was part
6 of the firefight down at the Mercedes; Watertown officer Menton
7 who actually did attend to Officer Donahue in that driveway.
8 I'm very worried that it was unclear. I was prepared to point
9 those kinds of things out.

10 There's also an issue with the chalk, Exhibit 775 that
11 was put in, for that same reason. It puts the cruiser -- the
12 MBTA cruiser in a way that the jury, if they looked at it,
13 would say he was in Tamerlan's line of fire. And that's
14 inaccurate. It simply cannot be allowed to stand.

15 If the government were willing to, you know, enter
16 into a stipulation about the friendly fire, then we don't need
17 to do that, but that, I would think, is almost a day just to --
18 or at least a morning of us putting on government witnesses.
19 So that may add to the time a little bit.

20 Those are some of my concerns. And those are concerns
21 that are exemplary more than specific; in other words, it seems
22 to keep coming up that we're preparing for witnesses that the
23 government shakes off at the very last minute.

24 MR. WEINREB: I wanted to add one thing on the general
25 topic of the defense putting in defense evidence in the

1 government case, which is that we received an email from
2 Mr. Watkins at 6 a.m. today asking us to have various items of
3 evidence in court for witnesses who will testify today that the
4 defense wants to introduce through cross-examination of those
5 witnesses. And we object to that. I think it would be easier
6 to frame the issue if I give the specifics.

7 So one of the witnesses who will testify today is
8 Brian Corcoran, an FBI agent who collected electronics and
9 explosives evidence on Laurel Street. One of the things that
10 was collected was a computer from a computer bag which the
11 defense will say was Tamerlan Tsarnaev's computer.

12 As it happens, we have no -- that issue is moot
13 because that computer, will, in fact, come through -- in the
14 government's case through Agent Corcoran. But we have no
15 objection to it anyway because he had personal knowledge of his
16 collection. But they've also said that -- as the Court will
17 recall, yesterday Sergeant Pugliese testified -- he was shown a
18 picture of the two brothers crouching behind a car. He was
19 asked which one was Tamerlan and which one was Dzhokhar, and
20 based on the color of their clothing he gave an answer which
21 obviously was not the answer the defense was expecting.

22 So they told us today that through another witness,
23 Stephanie Waite, who is a criminalist at the MSP lab, they want
24 to show her the clothing of the various suspects so -- and
25 introduce it through her. That's one where we do object.

1 Stephanie Waite's job is primarily to test items of
2 evidence for blood and then prepare that evidence so that the
3 blood can be DNA-tested. She does sometimes go to crime scenes
4 and checks surfaces and things for blood, but often she just
5 receives items in the lab, she opens up the evidence bags, she
6 takes little snippets of things, tests them for blood. And if
7 there's blood on them, puts them in the test tube, puts it in
8 the refrigerator so a DNA analyst can retrieve it.

9 This is a situation where the clothing of the brothers
10 was simply submitted to the lab, and she has no idea who was
11 wearing what. She has no personal knowledge of it. And yet --
12 you know, she photographed them, which she does in the lab, but
13 prior to cutting the little things out of them. And the
14 photographs may well say, you know, who it was seized from, but
15 that's just hearsay through her.

16 And we believe that if the defense wants to put in the
17 clothing of Tamerlan Tsarnaev or Dzhokhar Tsarnaev, they're
18 certainly entitled to do that, but that's evidence that they
19 should put in in their own case. If they need a government
20 witness to do it, they just need to give us adequate notice and
21 we'll make that witness available. We'll certainly make the
22 evidence available.

23 But it should come in through their witness, through
24 direct examination of their witness, so that the government has
25 an opportunity -- and we should have notice of it and we should

1 have notice of the exhibits just like we give them, even if
2 it's short notice, so that we can prepare cross-examination
3 that's appropriate of a witness who has actual knowledge of
4 what they're talking about. So, for example, if they bring in
5 a black jacket of Tamerlan Tsarnaev, we can say, "Wasn't he
6 also wearing a white shirt?" Stephanie Waite can't possibly
7 say whether he was also wearing a white shirt because she has
8 no idea what he was wearing.

9 And the idea of them putting in evidence through a
10 witness with no personal knowledge of it through
11 cross-examination, where they essentially tell the witness the
12 answer and the witness has a choice, on a national stage,
13 essentially, of either saying, "I don't know what on earth
14 you're talking about and, therefore, I seem like I don't know
15 what I'm doing," or, "yes," to simply make the question go
16 away, that's just not fair. They shouldn't be put in that
17 position and the government shouldn't be put in that position.

18 So, you know, we're happy to talk about these things
19 with the defense ahead of time, propose a solution. Getting
20 notice at 6 a.m. makes it harder. I understand we're all
21 operating on short time here so I'm not -- I just think the way
22 that it is proposed to be done is not appropriate and we would
23 object to it.

24 MR. WATKINS: Just to clear up a couple of things,
25 it's not that Stephanie Waite has no connection to this at all.

1 I'm reading through her case notes where she talks about
2 Tamerlan Tsarnaev's jacket. I mean, this is really not a
3 serious issue by the government. If what they're trying to do
4 is to make us do a chain of custody for the evidence that the
5 government has done, we're going to be here for a long time and
6 I'm going to need to take some time off to reconstruct that.
7 There were just a lot of people involved in this.

8 The jacket went to -- from both -- from the hospital,
9 I believe, or the EMTs, on through to the FBI where it stands
10 today. Maybe a dozen people touched it, more than that might
11 have touched it. Similar with the sweatshirt.

12 If what the government means to do is to put us
13 through that test and see if we can make every instance in the
14 chain, it seems a little bit unfair because we do not have
15 access -- the kind of access that they do, and it seems very,
16 very time-consuming to put us through that kind of exercise for
17 what is very -- really going to be an uncontested point, which
18 the sweatshirt of Dzhokhar -- the jury has seen that. The
19 jacket was collected.

20 I can try to go back through that chain and find the
21 person who actually did it, but it seems silly where this is a
22 relatively minor point. It's quite right -- Mr. Weinreb is
23 quite right. I got a wrong answer yesterday. I seek to
24 correct it because that, indeed, was a black jacket that he had
25 on.

1 MR. WEINREB: So if I can just add, whether it's
2 unfair or not, that's not what we're proposing to do. We have
3 no -- we are not trying to put the defense through their paces
4 or make them establish chain of custody. As soon as they call
5 a witness who has -- can say this clothing was on Tamerlan
6 Tsarnaev and it was removed and taken into government custody,
7 we'll admit -- we have no objection to it being admitted. But
8 somebody actually has to have knowledge of what he was wearing
9 as opposed to simply offering selected pieces to somebody who
10 just photographed them in a lab.

11 THE COURT: Well, I guess it depends on what the
12 witness would say. I mean, I don't see any reason in principle
13 why a defense exhibit couldn't come in on cross-examination
14 from an appropriate witness. So the question really is, is
15 this an appropriate witness based on what she knows about the
16 matter and I'm not familiar in detail with that. If -- I don't
17 know, for example, whether reading off the label of the package
18 that presents the matter to her is enough.

19 MR. WATKINS: Perhaps I could suggest that the
20 government could find that out from Miss Waite today because I
21 think the answer to that is going to be yes, she saw the label.
22 She identifies it in her case notes as the jacket of Tamerlan
23 Tsarnaev; the sweatshirt is Dzhokhar Tsarnaev. I don't think
24 there's going to be an issue through this witness about that.
25 If the government can look into that today, then all of a

1 sudden we have a whole morning free that we don't have to mess
2 around with.

3 THE COURT: Okay. So anyway, I guess as a generalized
4 objection, I don't think I would sustain it, but we'll have to
5 see what the witnesses say.

6 Let's go back to the identification of upcoming
7 experts -- notice of them, that is -- so the defense can be
8 ready for them. It sounds like there's going to be a lot of
9 expert evidence in the next week and a half.

10 MR. WEINREB: May I have one moment, your Honor?

11 (Counsel confer off the record.)

12 MR. WEINREB: So we were in the process yesterday
13 afternoon of preparing a list of witnesses from now all the way
14 to the end of the case which we're prepared to give to the
15 defense. I think that we -- I know we went upstairs last night
16 and we got most of the way, and then I think we got diverted
17 onto witness prep for today. But we'll finish that today and
18 we'll get it to the defense so they'll know everybody who is
19 going to testify all the way through the end of the guilt
20 phase.

21 MR. WATKINS: May I make a suggestion then? As I
22 understand it, Stephen Silva is going to be Witness No. 2 after
23 Henneberry today?

24 MR. CHAKRAVARTY: That's right, yeah.

25 MR. WATKINS: Perhaps -- I expect that that's going to

1 take the morning. Perhaps we could break today at one o'clock
2 and get back onboard with this -- the government's witness
3 list. Because it really is -- becomes very difficult for us to
4 plan. I know the Court wants an exhibit list and a witness
5 list from us, but it becomes a moving target where we have to
6 deal with these kinds of issues at a very last minute.

7 MS. CONRAD: May I just add one thing to that? I
8 mean, this is the first time that we're hearing that Azamat is
9 testifying tomorrow. He is a major witness. He's going to
10 require a lot of preparation. The Court had asked the
11 government to give us witnesses two weeks in advance. It
12 hasn't turned out that way. They gave us a list, I think it
13 was on Friday, of 20 witnesses. Azamat's name was not on
14 there. We had no reason to think he was even coming up this
15 week, much less tomorrow.

16 To put us in a position where they tell us 24 hours
17 ahead of time that a major witness, who they had not previously
18 notified us was even close is going to be on tomorrow, I mean,
19 I would ask that they at least postpone Azamat for a day to
20 give us time to prepare for that cross in light of the fact
21 that, you know, this list of 20 witnesses didn't even
22 include --

23 MR. WATKINS: I will add one thing to that. I had a
24 conversation with a member of the prosecution team -- not
25 here -- about what the next two days was going to be, and that

1 witness did not come up at all -- at all -- in that
2 combination. It's a name we've been waiting for so that we can
3 prepare appropriately for it. So that's all I'll say. It's
4 very difficult to prepare under these kinds of circumstances.

5 MS. CLARKE: There's another little logistical
6 issue -- and I completely understand, you know, how things get
7 all crazy when you're putting on a case. But we were notified
8 last night, I think, that Christopher Derks would testify
9 today. Christopher Derks --

10 MR. CHAKRAVARTY: Not today.

11 MS. CLARKE: No?

12 MR. CHAKRAVARTY: Not today.

13 MR. WATKINS: By the end of this week?

14 MR. CHAKRAVARTY: By the end of this week.

15 MS. CLARKE: Well, it looks like he's the Norfolk
16 apartment-seizing agent who will put in the items seized at
17 Norfolk although, you know, a whole host of agents were in
18 there, and we have no idea what exhibits he intends to
19 introduce. So it would be useful -- because then we could
20 decide again along the lines of this question of are they
21 putting in what we believe should be put in from Norfolk.

22 I mean, it's a painstaking detail-oriented analysis
23 for both sides, but we can't do it unless we know what they're
24 putting in. So that would be helpful to have.

25 MR. FICK: And one final note, we really appreciate

1 the government's notice that the forensic expert is likely to
2 come in on Thursday, and we simply -- you know, to the extent
3 that's going to change, from our logistical point of view it
4 can't change in a sooner direction because we have to get our
5 forensic guy in place, he's difficult to schedule, he's
6 expensive, et cetera. So Thursday's fine, we can be ready for
7 that, and we can be ready for something after it if it changes,
8 but, you know, that needs to stick, otherwise, we'll be in
9 mayhem tomorrow.

10 THE COURT: Well, who do you have this afternoon? Do
11 you agree that Silva might take the morning? Is he going to be
12 that long?

13 MR. CHAKRAVARTY: I don't think he'll -- I don't know
14 what the defense strategy is going to be on cross with him. As
15 with any cooperator, we budget a couple -- two times the amount
16 of direct. So I estimate an hour on direct but, you know, he's
17 a cooperator so...

18 MS. CONRAD: We still have a --

19 THE COURT: We're coming to that.

20 MR. CHAKRAVARTY: So that could go to most of the
21 morning and then we would have --

22 THE COURT: So then after that?

23 MR. CHAKRAVARTY: Evidence collection from --

24 THE COURT: From Watertown?

25 MR. CHAKRAVARTY: From Watertown.

1 MR. WEINREB: Watertown, yes. All the evidence
2 collection from Watertown which I think will be pretty
3 uncontroversial.

4 MS. CLARKE: And I don't think we have the exhibits
5 for that either.

6 THE COURT: Is that going to have an exhibit like we
7 had for Boylston Street?

8 MR. WEINREB: No.

9 MR. WATKINS: We're low tech at this stage.

10 MR. CHAKRAVARTY: In terms of the exhibits we intend
11 to introduce for many of the searches, our exhibit list is
12 pretty good about -- you know, specifying by both the FBI
13 numbers --

14 MS. CLARKE: It doesn't attach to a witness, is the
15 problem.

16 MR. CHAKRAVARTY: That is true but --

17 MS. CLARKE: Not to complain but --

18 MS. CONRAD: And it doesn't attach to a Bates number.

19 MS. CLARKE: And it doesn't attach to a Bates number.

20 MR. CHAKRAVARTY: But there should be an evidence
21 number and then there's a description.

22 MS. CLARKE: Well, for example, this morning I was
23 looking for a certain number, we don't have it, in your
24 numbered list and, you know, an hour later we find it in
25 discovery. But, you know, we don't have a Bates number, we

1 don't have it in the numbered list.

2 I understand how we get here as lawyers, but that's
3 just a little bit of the logistical problem we face.

4 MS. CONRAD: I mean the government's exhibit list in
5 many respects just has an exhibit number and a description.
6 There are hundreds of thousands of Bates numbers and --

7 MR. WATKINS: And one final complaint, because that
8 sounds like what we're doing here, is there are now exhibits
9 coming in in the higher numbers that we have not been provided
10 as exhibit numbers; in other words, they might appear on the
11 list. Hunting and pecking through the discovery to match that
12 up -- we were given, you know, an electronic version of the
13 exhibits at the beginning. I hear that there's an update
14 around but we have not been provided that. So it is the case
15 sometimes I'm going into court, I'm pretty sure I know what the
16 exhibit is when it gets called up but I can't tell you until
17 they actually put it up on the screen what it is.

18 So these are some of the issues that I think are a
19 result of moving very quickly -- too quickly through this
20 trial.

21 THE COURT: Yeah. So the original thought when we
22 were talking about a two-week span was to identify exhibits to
23 witnesses. Have you been doing that?

24 MR. CHAKRAVARTY: We have for when -- essentially
25 giving a list of 20 witnesses because that's what we were

1 mapping out and giving ourselves some flexibility to move
2 people around. For those we were giving --

3 MS. CLARKE: Oh, no, oh, no.

4 MR. WATKINS: No, no, no.

5 MS. CONRAD: It certainly wasn't on the list from
6 Friday.

7 MS. CLARKE: The first 20, yes.

8 MR. WATKINS: Kind of.

9 MS. CLARKE: The second 30, no.

10 MR. CHAKRAVARTY: Well, whether that be the case or
11 not, as the week goes on, we don't every day go back and update
12 simply because we're just so -- trying to assemble all of that
13 and preparing our case.

14 THE COURT: Well, fine. So there's some, you know, 10
15 percent variance or something like that. That's -- that may be
16 tolerable. But if there's no exhibits, then I think it's a
17 different story. I mean, I think it is fair to tell that
18 Witness X is going to talk about these seven exhibits
19 principally, and if it turns out there be six or eight, that's,
20 as I say, a tolerable variance, but --

21 MS. CLARKE: And we've been actually pretty good,
22 Judge, about not raising this as a complaint each time an
23 exhibit is shown to counsel only -- to the witness and counsel
24 only, and we haven't seen it, it hasn't been connected to that
25 person, we very quickly go, "Okay, we've seen that. We know

1 what that is" and have not objected. As you noticed, we
2 haven't objected to a lot of them.

3 THE COURT: So I think that perhaps it is a good idea
4 to stop at one today and prepare at least that kind of
5 information for the rest of this week, anyway, and then going
6 forward as you get to next week, so that people know what the
7 exhibits are.

8 Let's -- so let's come back to the issues about
9 Stephen Silva. We had a brief discussion about it the other
10 day. I don't think this is 404(b) because it's not offered for
11 404(b) purposes. So I think it's part of the government's
12 narrative, and the government, I think, is entitled to show why
13 it is plausible that Silva did what he will testify he did;
14 that is, provide a gun. That has to be put in context. And I
15 think the plausibility for the government is increased if the
16 actual context is shown. So I think the discussion about what
17 the purpose was is admissible: The intent to use in the drug
18 business.

19 I don't think it's necessary to have evidence of the
20 robbery of the Rhode Island kids. I think that's perhaps
21 cumulative. That's less on point. But I think that the
22 interaction between Silva and the defendant and explaining why
23 Silva -- why he knew Silva, I guess, and knew that Silva might
24 have access to this weapon and then went to him to get it and
25 so on and so forth, I think that's all part of the narrative

1 that the government is entitled to.

2 The government has --

3 MS. CONRAD: May I have a continuing objection to
4 that, your Honor, or do you want me to make it on the record?

5 THE COURT: I think it's clear but if you want to make
6 it again.

7 MS. CONRAD: It may be clear to you but I want to make
8 sure it's clear for the First Circuit.

9 THE COURT: I don't think they're that sticky.
10 They're stickier on instructions to objections.

11 The government also has a motion about Silva which is
12 testimony about the relationship between the brothers. My
13 interpretation of the motion is it's kind of a personal
14 knowledge objection. Anything he would know would be
15 secondhand.

16 MS. CONRAD: Well, you know, first of all, I haven't
17 heard the direct yet so I can't tell you what the cross is
18 going to be. But I think some of it, you know, it depends on
19 what the direct is.

20 THE COURT: Right.

21 MS. CONRAD: And I think some of it also -- I mean,
22 certainly not for the truth of the matter but state of mind as
23 to certain things that are going to come up. But I think it's
24 better to deal with it question by question because I don't
25 think --

1 THE COURT: Right. We'll evaluate it as the occasion
2 arises. In general there will have to be a personal knowledge
3 basis for it. That's one thing. There will also have to be
4 relevance. So it will have to be the right kind of evidence
5 about the relationship. It can't be mitigation evidence,
6 frankly. So there's two hurdles to it.

7 MS. CONRAD: I understand.

8 MR. CHAKRAVARTY: So being wary not to open the door
9 to any of that, one of my intended questions was to establish
10 that he had never met and never had contact with Tamerlan. I
11 want to be able to safely do that without risking that she then
12 says -- she meaning the defense -- the illustrious defense
13 counsel.

14 MS. CLARKE: You mean Ms. Conrad.

15 MS. CONRAD: I'm looking around. Who is he talking
16 about?

17 MR. CHAKRAVARTY: -- would, you know, perceive that as
18 opening the door somehow.

19 THE COURT: That wouldn't open the door necessarily.

20 MR. CHAKRAVARTY: One other question on Mr. Silva.

21 MS. CONRAD: It depends on what the question would be
22 on cross.

23 MR. CHAKRAVARTY: Mr. Silva is in prison garb and the
24 marshals have indicated that they would prefer to have his leg
25 shackles on. Mr. Silva is represented and he would prefer --

1 THE COURT: Who is his counsel?

2 MR. CHAKRAVARTY: Jonathan Shapiro.

3 THE COURT: Do you expect him to be here?

4 MR. CHAKRAVARTY: He is here.

5 THE COURT: Yeah.

6 MR. CHAKRAVARTY: And --

7 THE COURT: Does he have anything to say about it?

8 MR. CHAKRAVARTY: He would prefer that he not be
9 shackled, or rather, that the jury not see him shackled. So
10 the issue is if he is put in the box outside of the presence of
11 the jury -- we take a break -- but given that hopefully it will
12 be half an hour into the trial, that might be inconvenient.
13 The marshals did also say there will be two extra marshals
14 there just to establish security for this prisoner.

15 THE COURT: Do you have any viewpoint?

16 MS. CONRAD: Not off the top of my head.

17 THE COURT: Do you have any viewpoint independent of
18 the marshals?

19 MR. CHAKRAVARTY: I think that in my lay assessment,
20 but in my experience as a prosecutor, he does not present a
21 risk of flight or harm, and having the shackles removed would
22 facilitate him getting to the stand without controversy.

23 THE COURT: I think with all the marshals in the room
24 we don't need them, but I haven't heard from the marshals. But
25 that would be my inclination. There's plenty of marshals

1 present.

2 THE CLERK: Judge, there was one question with respect
3 to bringing up Mr. Silva. I mean, it sounded like, speaking
4 with Rob, I don't know if he's going to be in the back while
5 the trial is going on or if they need to go down and bring him
6 up and take any kind of a break.

7 THE COURT: How soon do you need him?

8 THE CLERK: They mentioned that.

9 MR. CHAKRAVARTY: We expect Mr. Henneberry to go about
10 a half an hour at the most.

11 THE COURT: So they could time it, right?

12 MR. WEINREB: Yeah, say 20 minutes.

13 THE COURT: Is there cross of Henneberry if they're a
14 half-hour?

15 MR. WATKINS: Nothing.

16 MS. CLARKE: Very short.

17 THE COURT: Yeah, so have him up --

18 THE CLERK: Ten o'clock?

19 THE COURT: -- about half an hour from when we get
20 going.

21 MR. WEINREB: I would say, to be safe, I think -- I'll
22 do Henneberry quite quickly, I think, 20 minutes.

23 MS. CLARKE: Do they have an issue with where they're
24 housing --

25 THE CLERK: I think it's just a matter of making sure

1 they're kept separate and, you know, they're bringing him up
2 and having him in the cell --

3 MS. CLARKE: Our guy stays up.

4 THE CLERK: I understand. I'm telling you what Rob's
5 concern was in terms of they may need to have a couple of
6 minutes to --

7 THE COURT: They may need to switch them in an
8 intermission.

9 MS. CLARKE: Right. Just leave Dzhokhar with us in
10 the courtroom.

11 THE COURT: Right. Okay. I think we should get
12 going. I do have one ex parte matter with the defense.

13 (The lobby conference concluded at 9:25 a.m.)

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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 10/5/15